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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND LAMAR THOMAS,

Defendant and Appellant.

C080577

(Super. Ct. Nos. 13F6476,
14F3994, 15F74)

Defendant Raymond Lamar Thomas was tried by a jury and found guilty of second degree robbery and carrying a concealed dirk or dagger. The trial court imposed a three-year prison term on the robbery conviction and a consecutive eight-month term on the concealed dirk or dagger conviction.

On appeal, defendant challenges the trial court's imposition of consecutive sentences. He claims that, because he maintained the same objective for both crimes, the consecutive term for the concealed dirk or dagger conviction should have

been stayed pursuant to Penal Code section 654.¹ We conclude there is substantial evidence to support the trial court's imposition of consecutive sentences and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2015, loss prevention officers Natosha Swinney-Antoine and Crystal Robinson were working at JCPenney in Redding. At approximately 8:30 p.m., Swinney-Antoine and Robinson were walking around the store when they saw defendant picking out items in the young men's department. After selecting approximately 11 items, defendant went into the fitting room. Swinney-Antoine and Robinson waited outside. A store manager went into the fitting room to let defendant know the store would be closing soon. When defendant became irritated and verbally combative, Swinney-Antoine called mall security for assistance. Security personnel, Shaun Coret, responded to the call.

After approximately 20 minutes, defendant left the fitting room wearing his backpack. Swinney-Antoine and Robinson "swept" the room (checked for merchandise) and found 4 of the 11 items were missing. Swinney-Antoine noticed defendant was wearing one of the missing sweaters. Swinney-Antoine, Robinson, and Coret escorted defendant out of the store.

Once outside, Swinney-Antoine and Robinson identified themselves as JCPenney loss prevention personnel and asked defendant about the stolen merchandise. Defendant said he "didn't have it," then became combative and attempted to flee, pushing Swinney-Antoine out of his way as she attempted to push him towards the door. Defendant continued to resist and fight as Swinney-Antoine and Robinson tried to move him back inside the store. Defendant reached his hand into his waistband. When he pulled his

¹ Undesignated statutory references are to the Penal Code.

hand out, Swinney-Antoine saw he had a knife. Coret immediately grabbed defendant's arm and yanked it, causing the "[v]ery large" knife to fly out of defendant's hand and fall to the ground. A screwdriver fell out as well. Coret then grabbed defendant by the back of the neck and, as defendant continued to struggle, Coret and Swinney-Antoine wrestled him to the ground and handcuffed him.

Swinney-Antoine, Robinson, and Coret took defendant back into the store. They discovered defendant was wearing a pair of stolen pants and a stolen sweater, and had stuffed a stolen hat down his pants. He also had a pair of stolen jeans rolled up behind his backpack.

Defendant later told Redding Police Officer Colby Darrah he stole the merchandise because he was cold, and said it was a "spur of the moment thing." He also stated he "keeps [the knife] for protection" because he had "been stolen from" in the past. Defendant admitted he kept the knife concealed under his clothes, but denied grabbing or displaying it during the incident.

Defendant was charged by information with second degree robbery (§ 211 – count 1), carrying a concealed dirk or dagger (§ 21310--count 2), and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364.1--count 3). The information alleged defendant used a deadly weapon in the commission of the robbery. (§ 12022, subd. (b).)

Defendant entered a negotiated plea of no contest to count 3. He was tried by a jury and convicted on counts 1 and 2. The jury found the deadly weapon allegation not true.

Finding the robbery and the concealed dirk or dagger offenses involved "separate incidents, separate events, separate circumstances, separate objectives," the trial court sentenced defendant to serve five years in state prison, comprised of three years (the middle term) on count 1, plus a consecutive term of eight months (one-third the middle

term) on count 2, a concurrent term of 180 days in county jail on count 3, and two consecutive eight-month terms for probation revocations in prior unrelated cases.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends imposition of consecutive sentences for second degree robbery and carrying a concealed dirk or dagger violated the prohibition against multiple punishments pursuant to section 654 because both offenses arose from an indivisible course of criminal conduct.

Section 654 provides in part, “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

“[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.]” (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If all the offenses were incident to one objective, the defendant may not be punished for more than one. (*Ibid.*) “On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he [or she] may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct.” (*Ibid.*, fn. & citations omitted.) The purpose of the protection against multiple punishment is to insure the defendant’s punishment will be commensurate with his or her criminal liability. (*Id.* at p. 552, fn. 4.)

Shared common acts do not establish a single indivisible course of conduct with a single objective. Where a defendant entertains multiple independent criminal objectives,

dual punishment is proper “even when the criminal violations share common actions and the intents occurred simultaneously.” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212; *People v. Beamon* (1973) 8 Cal.3d 625, 638-639; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

“The court, not the jury, determines the divisibility of the offenses for sentencing purposes.” (*People v. Flores* (1968) 267 Cal.App.2d 452, 459) “A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. [Citation.]” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

As a preliminary matter, the People argue defendant forfeited his claim for failure to object in the trial court. The People correctly point out defendant requested “the middle term on the robbery *with 8 months consecutive for the dirk or dagger conviction . . .*” (Italics added.) Where a defendant fails to challenge the trial court’s findings on a specific issue at sentencing, the claim of error is forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 351, 354 [lack of a timely and meaningful objection to a criminal sentence results in forfeiture of the claim].) The “unauthorized sentence” exception to the rule will only apply where the sentence “ ‘could not lawfully be imposed under any circumstance in the particular case’ [citation].” (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

In any event, defendant’s claim fails on the merits. The robbery and the carrying a concealed dirk or dagger offenses involved separate intents and objectives. Robbery is “the felonious taking of personal property in the possession of another, from his [or her] person or immediate presence, and against his [or her] will, accomplished by means of force or fear.” (§ 211.) “In California, [t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.’ [Citation.] It thus is robbery when the property was peacefully acquired, but force or fear was used to carry it away. [Citation.]” (*People v. Anderson* (2011) 51

Cal.4th 989, 994.) “The intent required for robbery has been described as the specific intent to deprive the victim of the property permanently. [Citations.] Thus, ‘the act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal’ [Citation.]” (*Ibid.*)

With regard to the robbery, defendant told Officer Darrah he stole the merchandise because he was cold. With regard to carrying the knife, defendant told Darrah he “keeps [the knife] for protection” because he had “been stolen from” in the past. Thus, his objective in carrying the knife was not to commit the robbery but rather to protect himself.

Nor was defendant’s carrying or use of the knife necessary to establish the force or fear element of the robbery, as he claims. “The requisite fear need not be the result of an express threat or the use of a weapon. [Citations.] Resistance by the victim is not a required element of robbery [citation], and the victim’s fear need not be extreme to constitute robbery [citation]. All that is necessary is that the record show ‘ ‘ ‘conduct, words, or circumstances reasonably calculated to produce fear. . . .’ ’ ’ [Citation.]” (*People v. Morehead* (2011) 191 Cal.App.4th 765, 775.) The prosecutor argued to the jury that, in order for a robbery to occur, “you can have physical resistance without a weapon.” That is, the force or fear element could be established by, among other things, the fact defendant physically pushed Swinney-Antoine out of the way while attempting to flee, or by the mere fact he reached into his waistband, placing Swinney-Antoine in fear. By finding the use of a deadly weapon allegation not true, the jury impliedly found defendant created the necessary force or fear in committing the robbery but expressly rejected the allegation he used the knife in doing so.

On this record, we conclude there is substantial evidence to support the trial court’s finding the robbery and the carrying of a concealed dirk or dagger offenses involved separate intents and objectives.

DISPOSITION

The judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
ROBIE, Acting P. J.

_____/s/
DUARTE, J.